

**SOAH DOCKET NO. 952-19-0705**

<b>APPLICATION OF LOWER</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>COLORADO RIVER AUTHORITY</b>	<b>§</b>	
<b>FOR OPERATING AND</b>	<b>§</b>	<b>OF</b>
<b>TRANSPORT PERMITS FOR</b>	<b>§</b>	
<b>EIGHT WELLS IN BASTROP</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>
<b>COUNTY, TEXAS</b>	<b>§</b>	

**ENVIRONMENTAL STEWARDSHIP’S OBJECTIONS AND MOTION TO STRIKE LCRA’S PREFILED REBUTTAL TESTIMONY AND EXHIBITS**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGES:

Environmental Stewardship files the following objections and motion to strike certain prefiled evidence submitted by LCRA. In particular, Environmental Stewardship moves to strike the prefiled testimony and exhibits associated with LCRA witnesses Leonard Oliver (LCRA Exhibits 68 and 69) and Bryan Cook (LCRA Exhibits 70 and 71). For support, Environmental Stewardship respectfully offers the following:

**I. Basis for Objections and Motion to Strike**

On August 9, 2019, LCRA served the parties in this matter with its prefiled rebuttal evidence, in accordance with the ALJs’ Order No. 3. Among the exhibits offered by LCRA as part of its rebuttal case are: Exhibits 68 and 69, the prefiled testimony and resume of Leonard Oliver; and Exhibits 70 and 71, the prefiled testimony and resume of Bryan Cook. Both of these witnesses offer testimony that is intended to respond to the prefiled testimony offered by Mr. George Rice and Mr. Joseph Trungale, expert witnesses testifying on behalf of Environmental Stewardship. Neither of these 2 rebuttal witnesses had been disclosed to the other parties as expert witnesses in this case, before LCRA submitted their rebuttal testimony and exhibits.

On February 26, 2019, Environmental Stewardship served LCRA with a Request for Disclosures. LCRA responded to that request on March 19, 2019. Neither Mr. Oliver nor Mr. Cook were designated as expert witnesses in LCRA’s Initial Response to

Disclosures.<sup>1</sup> On August 19, 2019, LCRA served the parties in this matter with its Third Supplemental Responses to Environmental Stewardship's and Recharge Water, LP's Requests for Disclosures. *See* Exhibit 1, attached. LCRA identified Mr. Oliver and Mr. Cook as expert witnesses, for the first time, via these Third Supplemental Responses to Requests for Disclosure—10 days after Mr. Oliver and Mr. Cook had submitted their prefiled testimony.

Indeed, the disclosures refer to Mr. Oliver's and Mr. Cook's prefiled testimony, in response to Rule 194.2(f)(3). That is, instead of describing the general substance of the expert's impressions and opinions and a brief summary of the basis for them, LCRA simply referred to Mr. Oliver's and Mr. Cook's prefiled testimony.

Although a number of documents were provided to the parties, as part of LCRA's Third Supplemental Disclosures, it appears that some of the information that Mr. Oliver and Mr. Cook relied on in preparing their prefiled testimony were not disclosed to the parties. For example, in his prefiled testimony, Mr. Oliver refers to TCEQ's naturalized flow workbooks for the Colorado River basin, but these workbooks are not included among the documents provided by LCRA in its Third Supplemental Disclosures to Environmental Stewardship. *See* LCRA Ex. 68, p. 7. Mr. Oliver also refers to Austin's long-term water supply program, known as Austin Water Forward, but this document does not appear to be included in LCRA's Third Supplemental Disclosures either. *See* LCRA Ex. 68, p. 11. In sum, LCRA not only failed to timely designate Mr. Oliver and Mr. Cook as experts, but they have also failed to provide the parties with all of the documents and other information that were reviewed by these two witnesses.

There is no reasonable justification for LCRA's failure to timely disclose Mr. Oliver and Mr. Cook. Environmental Stewardship disclosed its expert witnesses, Mr. Rice and Mr. Trungale, in its Initial Disclosures, served on the parties on May 17, 2019. Those disclosures were supplemented on June 26, 2019, by which Environmental Stewardship provided further details regarding Mr. Rice's and Mr. Trungale's opinions in

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<sup>1</sup> In its Initial Disclosures, Mr. Oliver was disclosed as a person with knowledge of relevant facts, but was not disclosed as an expert witness.

this matter. Environmental Stewardship timely filed its prefiled testimony and exhibits on June 28, 2019, which included the testimony of Mr. Rice and Mr. Trungale.

Thus, LCRA has been aware of the general nature of the opinions of Environmental Stewardship's expert witnesses since at least May 17, 2019, when Environmental Stewardship served its Initial Disclosures. Yet, LCRA failed to designate its rebuttal experts until August 19. Because LCRA failed to designate its expert witnesses in a timely manner, and because LCRA cannot demonstrate good cause for this failure to timely designate its witnesses, LCRA's witnesses must be excluded. *See* Tex. R. Civ. P. 193.6(a).

If the Honorable ALJs determine that LCRA's rebuttal witness testimony need not be excluded, Environmental Stewardship hereby provides notice of its intent to offer additional testimony in response to LCRA's rebuttal evidence.

## **II. Conclusion and Prayer**

For the reasons described above, Environmental Stewardship respectfully requests that its Objections and Motion to Strike be sustained and granted, and that LCRA's Exhibits 68, 69, 70, and 71 be stricken.

Respectfully submitted,

/s/ Marisa Perales

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State Bar No. 24002750

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**CERTIFICATE OF SERVICE**

I certify that a copy of Environmental Stewardship’s Objections and Motion to Strike LCRA’s Prefiled Rebuttal Evidence was served on all parties listed below on September 27, 2019.

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# EXHIBIT 1

**SOAH DOCKET NO. 952-19-0705**

<b>APPLICATION OF LOWER</b>	<b>§</b>	<b>BEFORE THE STATE OFFICE</b>
<b>COLORADO RIVER AUTHORITY</b>	<b>§</b>	
<b>FOR OPERATING AND TRANSPORT</b>	<b>§</b>	<b>OF</b>
<b>PERMITS FOR EIGHT WELLS IN</b>	<b>§</b>	
<b>BASTROP COUNTY, TEXAS</b>	<b>§</b>	<b>ADMINISTRATIVE HEARINGS</b>

**LOWER COLORADO RIVER AUTHORITY'S  
THIRD SUPPLEMENTAL RESPONSES TO  
ENVIRONMENTAL STEWARDSHIP'S AND RECHARGE WATER, LP'S  
REQUESTS FOR DISCLOSURES**

TO: Environmental Stewardship, by and through its attorneys of record, Eric Allmon, Frederick, Perales, Allmon & Rockwell, P.C., 1206 San Antonio, Austin, TX 78701, [eallmon@lf-lawfirm.com](mailto:eallmon@lf-lawfirm.com)

TO: Recharge Water, LP, by and through its attorneys of record, Paul Terrill, Shan Rutherford, Terrill & Waldrop, 810 West 10<sup>th</sup> Street, Austin, TX 78701, [pterrill@terrillwaldrop.com](mailto:pterrill@terrillwaldrop.com), [srutherford@terrillwaldrop.com](mailto:srutherford@terrillwaldrop.com)

Pursuant to Rule 194 and other applicable provisions of the Texas Rules of Civil Procedure, the Lower Colorado River Authority (LCRA) hereby serves this, its Third Supplemental Responses to Environmental Stewardship's Request for Disclosures, and to Recharge Water, LP's Request for Disclosures.

Respectfully submitted,

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BY: *Emily W. Rogers*  
Emily W. Rogers

## **RESPONSES TO REQUEST FOR DISCLOSURES**

- f. For any expert witness who is expected to testify at trial:
1. the expert's name, address and telephone number;
  2. the subject matter on which the expert will testify;
  3. the general substance of the expert's mental impressions and opinions and a brief summary of the basis for them, or, if the expert is not retained by, employed by, or otherwise subject to the control of the party to whom this Request is addressed, documents reflecting such information;
  4. if the expert is retained by, employed by, or otherwise subject to the control of the party to whom this Request is addressed:
    - A. all documents, tangible things, reports, models, or data compilations that have been provided to, reviewed by, or prepared by or for the expert in anticipation of the expert's testimony; and
    - B. the expert's current resume and bibliography.

### **RESPONSE:**

In addition to the disclosure of information provided in LCRA's Initial and Second Supplemental Disclosures, LCRA provides the following supplemental information:

Mr. Van Kelley prepared and filed rebuttal prefiled testimony and exhibits on August 8, 2019. Mr. Kelley's rebuttal testimony and opinions in the prefiled testimony are incorporated into LCRA's Rule 194.2(f) responses previously provided to the parties in this case.

Mr. Steve Young prepared and filed rebuttal prefiled testimony and exhibits on August 8, 2019. Mr. Young's rebuttal testimony and opinions in the prefiled testimony are incorporated into LCRA's Rule 194.2(f) responses previously provided to the parties in this case.

LCRA has previously provided materials and documents responsive to Rule 194.2(f)(4)(A) with its initial and supplemental disclosures. This Third Supplemental Rule 194.2 Disclosures updates and provides additional documents that have been provided to, reviewed by, or prepared by or for LCRA's expert witnesses, Van Kelley and Steve Young, in anticipation of their testimony. These documents are listed in their prefiled rebuttal testimonies, and are either publically available on the State Office of Administrative Hearings' E-Services website or the District's website, or are made available to all parties through the Bickerstaff Heath Delgado Acosta LLP Sharefile site in the Sharefile folder titled LCRA's 3rd Supp. Resp. to Discl., the link to which will be provided to the parties by email. In addition to the materials made available on the Bickertstaff Sharefile site, LCRA's experts have reviewed the prefiled testimonies of other LCRA witnesses, the District, and other parties in this case, as well as documents produced to LCRA and others by the various parties in this case.

In addition to Mr. Kelley and Mr. Young, LCRA identifies the following experts for LCRA, who will provide rebuttal testimony in this matter.

1. Leonard Oliver  
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Austin, TX 78703  
512-472-3200
2. Bryan Cook  
Lower Colorado River Authority  
3700 Lake Austin Blvd,  
Austin, TX 78703  
512-472-3200

Mr. Oliver and Mr. Cook prepared and filed rebuttal prefiled testimony and exhibits on August 8, 2019. The subject matter to which they will testify, and their mental impressions and opinions are in their respective rebuttal testimonies. Their testimonies and opinions in the prefiled testimonies are incorporated into LCRA's Rule 194.2(f) responses previously provided to the parties in this case.

Materials reviewed by Mr. Oliver and Mr. Cook are identified in their prefiled rebuttal testimonies and those will be made available through the Bickerstaff Heath Delgado Acosta LLP Sharefile site in the folder titled LCRA's 3rd Supp. Resp. to Discl., the link to which will be provided to the parties by email. In addition to the materials made available on the Bickertstaff Sharefile site, LCRA's experts have reviewed the prefiled testimonies of other LCRA witnesses, the District, and other parties in this case, as well as documents produced to LCRA and others by the various parties in this case.

Mr. Cook also relied upon the 2011 Basin and Bay Area Expert Science Team BBEST Environmental Flow Regime Recommendations Report which is available on the Texas Commission on Environmental Quality's web site at:  
[https://www.tccq.texas.gov/permitting/water\\_rights/wr\\_technical-resources/eflows/colorado-lavaca-bbasc-bbest](https://www.tccq.texas.gov/permitting/water_rights/wr_technical-resources/eflows/colorado-lavaca-bbasc-bbest).

**CERTIFICATE OF SERVICE**

I hereby certify by my signature below that on the 19<sup>th</sup> day of August, 2019, a true and correct copy of the above and foregoing document was forwarded via email or First Class Mail to the parties on the attached Service List.

*Emily W. Rogers*  
\_\_\_\_\_  
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## SERVICE LIST

### **APPLICATION OF LCRA FOR OPERATING AND TRANSPORT PERMITS FOR EIGHT WELLS IN BASTROP COUNTY SOAH DOCKET NO. 952-19-0705**

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